In Northeast there was not the slightest suggestion that the licensee had engaged in any discriminatory conduct in any aspect or at any stage of its employment decisions; indeed, the Commission specifically stated that there was no evidence that the licensee ever discriminated against any person at any time. Id, Para. 6. Nonetheless, the Commission sanctioned the licensee because it was dissatisfied with the licensee's good faith decisions as to which applicants were sufficiently qualified to warrant being interviewed. Northeast, Paras. 9 and 14. In other words, although the Commission acknowledged that there was no evidence that the licensee actually discriminated against anyone in making decisions about which applicants should be interviewed, the Commission concluded that because the licensee's bona fide decisions did not produce sufficient numbers of minority interviewees, its decisions were improper and warranted a sanction (in this case, a notice of apparent liability in the amount of $11,000.)

Northeast is a clear-cut instance where the Commission has sanctioned a licensee because its bona fide employment decisions did not produce the "correct" racial result. The message this new development sends out to all broadcast licensees is perfectly clear. Notwithstanding Section 73.2080 (a) of the Rules and the

Commission decisions which, according to the Commission, stand for the proposition that if a licensee does not discriminate and engages in vigorous, "good faith" recruitment efforts, it will not be sanctioned even if its "numbers" are not "good" (however that term is defined), [10/] the Commission now insists that, if necessary, licensees must take race into account in making decisions as to which job applicants should be interviewed.[11/] This irrefutably confirms that, despite its protestations to the contrary, the Commission's EEO regulations are not entirely "efforts-based" and require that licensees achieve a certain level of minority representation, not merely in their applicant pools, but in deciding which applicants should be interviewed, and which interviewees should be hired.[12/] Since the Commission has now inserted the requirement of racial preferences into its review of licensees' EEO performance, the Commission's EEO regulations must

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10/ See NPRM, Para. 7, note 15, citing, e.g., Certain Broadcast Stations Serving Communities in the State of Louisiana, 7 FCC Rcd 1503, 1505 (1992), as "holding that station that did not hire minorities complied with EEO rule based on recruitment efforts."

11/ This appears to be squarely at odds with the requirement that, whenever possible, licensees must make employment-related decisions without knowing the race of the individual involved.

12/ See discussion in Section IV 2, above.

be judged by "strict scrutiny" standard established by the Supreme Court in Adarand.

4. The Commission's Requirement that Licensee's Provide Job Hires and Promotions Information on FCC Form 396

The EEO part of the Commission's license renewal application form strongly reinforces the concept that licensees are judged on the results of their EEO efforts, and not upon those efforts themselves. Sections IV and V of the Commission's Model Equal Employment Opportunity Program (FCC Form 396) require broadcast license renewal applicants to supply the Commission with total and minority job hires information (Section IV) and total and minority promotions information (Section V) at the station during the 12-month period prior to the filing of the renewal application. In both cases, information must be supplied for both "all" and "upper-level" positions. The requirement that licensees furnish this information is a further example of the result-oriented nature of the Commission's EEO regulations, and inevitably pressures licensees, who would not otherwise do so, to discriminate against non-minorities in employment decisions.

5. The Commission's Reliance on the Analysis of Assistant Attorney General Walter Delinger Is Misplaced.

As mentioned above, the Commission cites in support of its contention that Adarand is inapplicable to its EEO rules the analysis of Assistant Attorney General Walter Delinger in his Memorandum of June 28, 1995, to All Agency General Counsels. In the passage cited by the Commission (NPRM, Para. 15), Mr. Delinger wrote as follows:

> Mere outreach and recruitment efforts, however, typically should not be subject to the Adarand standards. Indeed, post-Croson cases indicate that such efforts are considered race-neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, Adarand ordinarily would be inapplicable. (Emphasis supplied, footnotes omitted)

There is no need to consider whether the general thrust of Mr. Delinger's comments reflect a correct statement of the law. His comments are irrelevant in the context of the Commission's EEO regulations precisely because, as demonstrated herein, and particularly in Section IV 4, above, the Commission does have a

policy of encouraging licensees to use race/ethnicity in "actual decisions" and "in selecting persons from the expanded pool."

6. In Any Event, the Commission's EEO Rules Can Not Be Applied to Broadcast Employees in Most Job Categories.

There is another hard problem which the Commission faces in attempting to justify its EEO rules, insofar as they are applied to the employment of persons in all positions at broadcast stations. The Commission contends that there is a significant correlation between an increase in the employment of minorities in certain positions at broadcast stations and an increase in program diversity, which is the purported goal of the Commission's EEO rules.[13/] NPRM, Para. 3. But assuming, arguendo, the validity of this contention (but see pages 28-29, regarding the absence of any supportable basis for this contention), it is indisputable that not all broadcast station employees have significant influence over

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13/ In addition to acknowledging that the Supreme Court's alleged "indirect endorsement" of the Commission's EEO rules is based solely on its statutory authority to ensure that its licensees' programming is responsive to the needs and tastes of minorities, the Commission also expressly acknowledges that its "EEO Rule is not intended to replicate federal and state antidiscrimination laws" but rather "to advance the Commission's unique program-diversity-related mandate." NPRM, Para. 5.

station programming. "Officials and managers" and certain employees involved in the programming of television stations and some radio stations obviously have significant influence over the programming and the diversity of programming which is available to the public. But that having been said, the fact remains that the large majority of employees at broadcast stations, including both television and radio stations, hold positions where they have virtually no ability to influence the extent to which their stations contribute to the "diversity of programming," and therefore an increase in the employment of minorities in these positions will have no influence whatever in achieving the Commission's stated goal for minority employment.[14/] NPRM, Para 3.

According to the Commission's published statistics, as of 1994 employment in the broadcasting industry was broken down as follows: officials and managers-30,633; professionals-47,255; technicians-24,372; sales workers-23,016; office/clerical-18,070; craftsmen-

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14/ Golden believes the alternative rationale advanced by the Commission to support its EEO Rule -- namely, "employment discrimination inhibits our efforts to diversify media ownership by impeding opportunities for minorities and women to learn the operating and management skills to become media owners and entrepreneurs" (NPRM, Para. 3, footnote omitted) is far too tenuous to pass Constitutional scrutiny under Adarand.

972; operatives-635; laborers-194; and service workers-495. See Commission Public Notice 54194 (released June 2, 1995).

Even if all employees in the "official and managers" are assumed to have significant influence over station programming, this represents only 21.0% of all broadcast station employees. No other category of broadcast employee can reasonably be considered as typically having significant influence over station programming. The Commission's definition of the term "professional" is extremely broad, and it is doubtful whether more than a small fraction of the employees in the "professionals" category have real influence over programming, particularly at radio stations, where "professionals" are typically announcers, and are responsible for such duties as introducing and playing musical selections, making PSA announcements, reading weather reports, inserting commercial messages, etc., which have little to do with "program diversity."[15/]

15/ The term "professionals" is defined by the Commission in the Instructions to FCC Form 395-B as follows: "Occupations requiring either college graduation or experience of such a kind and amount as to provide a comparable background. Includes: on air personnel, correspondents, producers, writers, editors, researchers, designers, artists, musicians, dancers, accountants, attorneys, nurses, publicists, film buyers, rating and research analysts, systems analysts and programmers, financial analysts, state managers, cinema

Similarly, and except for a few management-level sales personnel, sales personnel typically have little if any influence on station programming or program diversity. Except in the rarest of circumstances, technicians, office/clerical personnel, craftsmen, operatives, laborers, and service workers have no influence over station programming and are in no position to contribute to program diversity. Therefore, even if the Commission's "program diversity" rationale is accepted as justifying the Commission's EEO rules, and even if the Commission could establish that a link between minority employment in certain positions at broadcast stations and the enhancement of program diversity, there is no justification for the assumption, which the Commission has apparently engaged in for more than 25 years, that employment in categories other than "official and managers" and a limited number of "professionals" have more than minimal impact on program diversity. That being the case, there is no conceivable justification for the Commission's insistence that stations engage in EEO "affirmative action" to encourage the employment of minorities in all nine employment categories on its Annual Employment Report form.

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photographers, senior staff assistants, personnel interviewers, and continuity directors."

Conclusion

For the reasons set forth above, Golden believes that Section 73.2080(c)(2) of the Commission's EEO Rule, as it has been interpreted by the Commission to require licensees to take "affirmative action" to recruit, hire, and promote members of minority groups, is subject to the "strict scrutiny" test established in Adarand. Golden asks the Commission to carefully and fairly consider this issue in the context of this rulemaking proceeding. If the Commission concludes, as Golden believes it must, that its tentative position regarding the applicability of Adarand is incorrect the Commission must then consider whether the Commission's EEO rules meet the "strict scrutiny" standard of Adarand. Golden is confident that the Commission will conclude that Section 73.2080(c)(2) does not meet the "strict scrutiny" standard for several reasons, the primary one being that the Commission has no legally-supportable factual predicate to support the position that an increase in the employment of minorities at broadcast stations will have an appreciable influence on the program diversity available to station audiences. Perhaps an increase in minority employment would produce a significant increase in diversity of programming -- and perhaps not. The fact

remains that, insofar as Golden is aware, the Commission does not have the slightest factual basis on which to reach a conclusion one way or the other. Of course, the mere assertion of the untested (and probably untestable) hypothesis that increased minority employment would produce a significant increase in program diversity is a completely inadequate basis for the Federal Government to engage in the preferential treatment of minorities based on their race.[16] In the absence of a firm and well-founded correlation between the goal which the Commission seeks to achieve and the racially-oriented method selected by the Commission to bring about that goal, Section 73.2080 (c)(2) of its EEO regulations does not pass the Adarand "strict scrutiny" standard.

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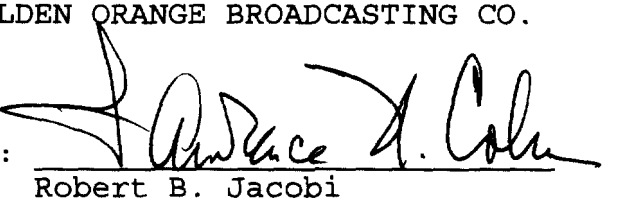
[16] While maintaining that Adarand is inapplicable to its EEO regulations, the Commission nonetheless asserts that "as more minorities and women are employed in the broadcast industry, varying perspective are more likely to be aired." NPRM, at Para. 3. However, the Commission offers no authority for this assertion, which it appears to adhere to as a self-evident proposition (contrary to the requirements of Adarand. Nor does the Commission attempt to define the phrase "varying perspectives" or to explain how much "more likely" a given increase in minority employment is expected to produce an increase in the expression of the undefined "varying perspectives."

Accordingly, Golden submits that the Commission should use this rulemaking proceeding to delete Section 73.2080(c)(2) of its Rules entirely.[17/]

Respectfully submitted

GOLDEN ORANGE BROADCASTING CO.

By: 

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17/ Golden appreciates that the 1992 Cable Act, Section 22(f), 47 U.S.C. § 334, prohibits the Commission from revising its EEO regulations or forms which were in effect as of September 1, 1992, insofar as they relate to television stations, and that this provision is inconsistent with the relief requested herein insofar as it applies to television as well as radio station licensees. There are two answers to this contention. The first is simply that the demands of the U. S. Constitution take priority over any inconsistent Federal Statute. The Commission is not free to disregard the requirements of the U. S. Constitution, as interpreted by the U. S. Supreme Court (e.g., the Adarand decision), even if directed to do so by a Federal Statute. The second point is that the statute does not restrict the Commission from reviewing its EEO regulations insofar as they relate to radio stations. And if, as requested herein by Golden, the Commission were to review its EEO regulations as they apply to radio stations and conclude that they do not meet the "strict scrutiny" standard set forth in Adarand, the Commission could not continue to apply the current EEO regulations to television stations without violating the Equal Protection Clause of the 5th Amendment to the U.S. Constitution.